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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA,
Petitioners,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX.

	PAGE
Jurisdiction	1
Constitutional Provisions, Treaties, Federal Statutes, Rules of the Supreme Court, Orders of the Federal Power Commission and State Statutes and Official Acts Involved	2
Questions Presented	3
Statement of the Case	4
Argument	12
The Petition does not show the existence of a case	12
Petitioners do not have such an interest in the subject matter as enables them to Petition for a Writ of Certiorari	13
There is no occasion for this Court to exercise here its supervisory power over judgments of lower Federal Courts	15
Justice requires that the Petition for Certiorari be denied	17
The authority of the Federal Power Commission to issue to Respondents a license on September 19, 1957, upon Respondents' application of August 20, 1956, as amended on September 19, 1956 and September 9, 1957 is unquestioned	18
The validity of the license of September 19, 1957 is unquestioned	19
Conclusion	20
The Petition for Certiorari should be denied	20
Appendix A	21
Appendix B	27

CASES CITED.

Cantos v. Styer, 329 U. S. 686	15
Dinsmore v. Southern Express Company, 183 U. S. 115	16
Massachusetts v. Mellon, 262 U. S. 447, 488	13
Mills v. Green, 159 U. S. 651, 653	12
Pan American Airways Corp. v. Grace & Co., 332 U. S. 827	15

PAGE

Schenley Distilling Corp. v. Anderson, 333 U. S. 878 . . 15
U. S. v. Munsingwear, 340 U. S. 36, 39 . . . . . 15, 18
Uyeki v. Styer, 329 U. S. 689 15

TREATIES, CONSTITUTIONAL PROVISIONS AND STATUTES.

Boundary Waters Treaty of 1909 (36 Stat. 2448) 4
Constitution of the United States, Art. III, § 2 . . . . 2, 12, 21
Federal Power Act, § 313(b) 2, 7, 8, 22
Federal Power Act, § 4(e) and (f) 3, 7, 8, 17, 19, 22, 23
New York Public Authorities Law, § 1001 . . . . . 3, 8, 25
New York Public Authorities Law, § 1005 (3) 3, 25
New York Public Authorities Law, § 1008 . . . . . 3, 8, 26
Notes between United States and Canada, May and October, 1941 (55 Stat. 1276, 1380) 4
Public Law 85-159, Act of August 21, 1957, 71 Stat. 401 . . . . . 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 23
Reservation attached by Senate to 1950 Treaty 5, 6
Rule 19, Revised Rules of the Supreme Court of the United States 2, 22
Treaty between the United States and Canada, 1950, (1 U. S. T. 694; T. I. A. S. No. 2130) 2, 4, 21
28 U. S. C. § 1254 (1) 1, 2, 12, 21

HEARINGS, REPORTS, ORDERS AND DOCUMENTS.

Canadian Government's Acceptance of Reservation . . 6
Communication from Department of State to Canadian Government calling attention to Reservation . . . 6
Hearings, April 10-13, 1957, Subcommittee of Public Works, Senate 10
Message, the President Transmitting Treaty to the Senate, May 2, 1950 5
Opinion of Attorney General of New York, July 5, 1957 27-35
Order of Federal Power Commission, November 30, 1956 . . . . . 3, 24
Order of Federal Power Commission, September 19, 1957 . . . . . 3, 24
Report, Committee on Foreign Relations, Senate 6
Report, Committee on Public Works (House of Representatives, No. 862, 85th Cong. 1st Sess.) 17
Report, Committee on Public Works (Senate, No. 539, 85th Cong. 1st Sess.) 17

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Jurisdiction.

Petitioners would invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1). The People of the State of New York, one of the parties to the case in the Court of Appeals for the District of Columbia, suggests to the Court

that its jurisdiction may not be invoked under that section because the petition fails to show (1) that there is presently a case, (2) that petitioners have any such interest in the subject matter as will enable them to petition for a writ of certiorari, and (3) that there is any occasion for the exercise by this Court of its supervisory power over judgments of lower Federal courts by the issuance of a writ of certiorari.

This Court has, of course, jurisdiction to determine its jurisdiction.

The People of the State of New York suggests to the Court that justice requires that the petition for certiorari be denied.

Constitutional Provisions, Treaties, Federal Statutes, Rules Of The Supreme Court, Orders Of The Federal Power Commission And State Statutes And Official Acts Involved.

The Constitution of the United States, Article III, Section 2 (Appendix A to this brief).

The Treaty Between the United States and Canada Concerning the Uses of the Waters of the Niagara River, signed February 27, 1950 and the Reservation the Senate attached thereto (1 U. S. T. 694; T. I. A. S. No. 2130) are set forth in the Joint Appendix below, pages 25-32. The Reservation is quoted *infra*.

28 U. S. C. § 1254(1) (Appendix A to this brief).

Federal Power Act § 313(b) (Appendix A to this brief).

Rule 19 of the Revised Rules of the Supreme Court of the United States (Appendix A to this brief).

Federal Power Act § 4(e) and (f) (Appendix A to this brief).

Act of August 21, 1957, 71 Stat. 401, P. L. 85-159—This Act is set forth in Appendix D to the petition and in pertinent part in Appendix A to this brief.

Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license, is set forth in Appendix B to the petition.

Order of the Federal Power Commission of September 19, 1957, issuing a license to respondent, is set forth in Appendix 4 of respondent's brief and in pertinent part in Appendix A of this brief.

New York Public Authorities Law §§ 1001, 1005, subd. 3, 1008 (Appendix A of this brief).

The formal opinion of the Attorney General of the State of New York that the Power Authority has the right to accept a license issued with the conditions contained in P. L. 85-159, dated July 5, 1957, is set forth in Appendix B of this brief.

Questions Presented.

1. Do the petitioners present a justiciable controversy?

2. Have the petitioners any such interest in the subject matter as will enable them to petition for a writ of certiorari?

3. Is there any occasion for this Court to exercise its supervisory power over judgments of lower Federal courts by the issuance of a writ of certiorari?

4. Does justice require that the petition for certiorari be denied?

5. Is the authority of the Federal Power Commission to issue to respondent the license of September 19, 1957 upon respondent's application of August 20, 1956, as amended September 19, 1956 and September 9, 1957, questioned?

6. Is the validity of the license of September 19, 1957 questioned?

Statement Of The Case.

There came into force on October 10, 1950 a Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River (Joint App. p. 36). By that Treaty, which was signed February 27, 1950, both countries agreed that the water resources of the Niagara could be more fully and efficiently used for the generation of hydroelectric power in each country for the benefit of their respective peoples and still preserve and enhance the scenic beauty of the Falls (Joint App. pp. 25-26). To this end, the countries agreed:

To terminate the existing international agreements, Article V of the Boundary Waters Treaty of 1909 (36 Stat. 2448) and the Notes of May and October, 1941 (55 Stat. 1276, 1380), limiting the diversions of water from the river in Canada and in the United States for power purposes;

To complete, under supervision of the International Joint Commission, certain remedial works necessary to enhance the beauty of the Falls and to share the cost thereof;

To make available for purposes of the Treaty—(a) reservation of a sufficient amount of water in the river for scenic purposes, and (b) diversion of water for power

purposes—the total outflow of Lake Erie less the amount of water used for domestic and sanitary purposes and for service of canals;

To prevent diversions for power purposes which would reduce the flow over the Falls to less than a certain number of cubic feet per second at specified times;

To permit diversion for power purposes of the water in excess of that reserved for scenic purposes;

To divide equally the water available for power purposes;

To each designate a representative to determine the amounts of water available for purposes of the Treaty;

To permit the use by one of such part of the other party's share of the water for power purposes as the other did not have the facilities to use;

To absolve each from responsibility for damage in the territory of the other by any act authorized by the Treaty, and

To exchange ratifications, at which time the Treaty would come into force and continue in force for fifty years (Joint App. pp. 25-30).

President Truman, in transmitting the Treaty to the Senate for its concurrence on May 2, 1950, said that "* * * how additional facilities shall be developed to achieve the best use of waters to be diverted for power purposes * * * is not determined by the Treaty itself * * * [and] is entirely a domestic problem" (Joint App. pp. 19-20).

Nevertheless, in its resolution advising and consenting to ratification of the Treaty, the United States Senate included what it termed the following reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

The Senate Committee on Foreign Relations in recommending that the Senate advise and consent to ratification of the Treaty subject to the reservation, said:

> "* * * the subject matter of the reservation concerns the United States Constitutional process alone. * * * without the reservation the redevelopment for power purposes would be governed by the federal power act. The committee intends by the reservation to retain that power in the hands of the Congress" (Joint App. p. 20).

The Department of State, when it called the reservation to the attention of the Canadian Government, took the position that the subject matter was domestic in nature and concerned the United States Constitutional process alone (Sup. Joint App. p. 18).

The Canadian Government accepted the reservation "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty" (Joint App. p. 21).

Since the effective date of the Treaty, all of its provisions have been given effect except that there has been no diversion of additional waters in the United States for power purposes. As authorized by the Treaty, Canada has been diverting not only its share but also the United States' share because facilities are not available in the United States for use of its share (Joint App. p. 21).

Although Congress had not acted in accordance with this reservation, no one challenged the legality of this reservation until August 20, 1956.

On that date Power Authority of the State of New York (respondent), a corporate municipality and a political subdivision of the State charged with the duty of developing the hydroelectric power resources of the State in the Niagara River, filed an application with the Federal Power Commission for a license under Section 4(e) of the Federal Power Act for a power project which would utilize all of the United States' share of the waters of the Niagara River which may be diverted for power purposes (Joint App. pp. 9-14). By this application respondent presented to the Federal Power Commission the question whether the reservation had effectively removed the waters of the Niagara River from its general jurisdiction under the Federal Power Act (Joint App. pp. 14-24).

The People of the State of New York were allowed to intervene in the proceeding before the Federal Power Commission in support of the Power Authority's application (Joint App. p. 35).

The Federal Power Commission dismissed the application on the single finding that it is without authority to issue a license for the redevelopment proposed by the Power Authority (Joint App. p. 39). The Commission based this so-called finding on its conclusion that:

> "Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the supreme Law of the Land under Article VI of the Constitution * * *" (Joint App. p. 38).

The Power Authority filed in the United States Court of Appeals for the District of Columbia Circuit a petition

under Section 313(b) of the Federal Power Act to set aside the whole of the order of the Federal Power Commission dismissing the Power Authority's application for a license under Section 4(e) of the Federal Power Act for a power project (Joint App. pp. 1-7).

The People of the State of New York were, by order of the Court of Appeals dated February 15, 1957, permitted to intervene as a party in the case in that court. The interest of the People of the State of New York in the case was based upon the provisions of the New York Public Authorities Law section 1001 wherein that part of the Niagara River within the boundary of the State of New York is declared to be a natural resource of the State for the use and development of commerce and navigation in the interest of the people of the state ~~and~~ wherein it is declared that:

> "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, and to preserve and enhance the scenic beauty of the Niagara Falls and river, such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the watersheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their ownership, possession and control, shall always remain inalienable to, and ownership, possession and control thereof shall always be vested in, the people of the state."

and the provisions of the New York Public Authorities Law section 1008 whereby the Power Authority has the right to occupy and use any and all property of the State of whatever kind or character on the Niagara River, the right to exercise any and every right and power of the State in connection therewith, whether proprietary or sovereign in

character which the State itself might exercise, provided that it does not permit the impairment or limit the future improvement of the navigability of the river and provided that it does not limit, waive or surrender any right or interest of the State in such river of the use thereof.

Petitioners here also sought and were allowed to intervene in the case in the Court of Appeals. In their petition for intervention in that Court they alleged their interest as follows:

> "The movants are keenly aware of the urgent need for additional power supplies to meet needs of domestic and industrial users, as well as national defense requirements. The shortage of low cost power in the area to be served by the proposed redevelopment of the Niagara River presents a serious problem not only for the City of Jamestown, but for those other municipally-owned electric systems of New York State, Pennsylvania and Ohio whose interests are represented by the American Public Power Association. These movants have consistently favored early legislation to authorize construction of the Niagara project by the Power Authority of the State of New York. At an appropriate time they will urge that the redevelopment of the Niagara should follow the pattern established by the Congress [citing statutes] providing for preferences to local public agencies and rural electric cooperatives in the marketing of the power produced."

The case was argued in the Court of Appeals on April 4, 1956.

By a two to one decision handed down on June 20, 1957, the Court of Appeals held that:

> "The disposition of the United States' share of the water covered by this treaty was, even apart from the reservation, something 'which we in the United States must settle under our own procedures and laws.' The reservation, therefore, made no change in the treaty.

> It was merely an expression of domestic policy which the Senate attached to its consent." (Appendix A to the Petition.)

and set aside the order under review and remanded the case to the Federal Power Commission for further proceedings.

Meanwhile, on April 13, 1957, petitioners had appeared before a Subcommittee of the Committee on Public Works, United States Senate, which was holding hearings on bills to authorize the construction of certain works of improvement in the Niagara River for power and other purposes, and had urged passage of a bill authorizing and directing the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water of Niagara River permitted to be used by international agreement and mandating the inclusion in such license of certain conditions in respect to preferences in the sale of power from the project. (Hearings before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, First Session on S.512, S. 1037, April 10-13, 1957, and pp. 305-309.) Attention is called to the fact that petitioners in their appearance before the Committee did not suggest that they derived any right to any legislation from the Senate's reservation to the 1950 Treaty.

After the decision of the Court of Appeals, the Act of August 21, 1957, Public Law 85-159, became law and as the portion of the Act quoted in Appendix A of this brief shows petitioners obtained from Congress such preference conditions as Congress in its wisdom determined should be included in the license it directed to be issued (Appendix D to petition). It is to be noted that the language of the Act passed by Congress does not refer to the Senate's reservation to the 1950 Treaty.

On August 28, 1957, the Power Authority amended its license application of August 20, 1956 to conform with the provisions of Public Law 85-159.

The next day the Federal Power Commission announced that it would issue a license to the Power Authority as soon as certain engineering studies could be completed.

Although the Federal Power Commission on September 12, 1957 scheduled a public hearing to be held on October 1, 1957 on certain conditions to be included in the final license to be issued to the Power Authority, petitioners did not ask the Commission to do anything in respect to the license the Commission said it was going to issue.

Petitioners filed their petition for certiorari on September 18, 1957, the last day on which they could timely do so and they meanwhile took no steps to stay any proceedings before the Commission on the remand of the case.

The next day the Commission, having completed the engineering studies and without any objection from petitioners, carried out its previously announced intention and issued to the Power Authority a license upon its application of August 20, 1956, as amended, reserving for consideration at the scheduled public hearing certain issues as to which petitioners have evidenced no concern.

On October 15, 1957 the Power Authority notified the Federal Power Commission that it accepted the license.

The aforementioned hearings are now being carried on and petitioners have not entered an appearance.

ARGUMENT.

The Petition Does Not Show The Existence Of A Case.

The judicial power of the United States extends to cases specified in Article III of the Constitution. The petition fails to show that there is presently any case between adverse interests which would permit this Court to exercise the appellate jurisdiction vested in it by Congress to consider granting certiorari (28 U. S. C. § 1254(1)).

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." (*Mills* v. *Green*, 159 U. S. 651, 653.)

The enactment of Public Law 85-159 renders it impossible for this Court, if it should decide the issue as to the validity of the treaty reservation in favor of petitioners, to grant them any effectual relief whatever. If this Court were to decide that the reservation deprived the Federal Power Commission of authority under the Federal Power Act to issue a license for development of electric power from the United States' share of the waters of the Niagara River, the decision would have no effect whatever on the rights of the petitioners. Every controversy as to the rights of the parties to this case in the Court below was

finally resolved by Public Law 85-159 and there is no longer a case. For that reason alone the petition for certiorari should be denied.

Petitioners Do Not Have Such An Interest In the Subject Matter As Enables Them To Petition For A Writ of Certiorari.

This Court has no power *per se* to say what is the "supreme Law of the Land", but may do so

> "* * * only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * *" *Massachusetts* v. *Mellon*, 262 U. S. 447, 488.

To permit consideration by this Court of petitioners' application for certiorari it was incumbent upon them to show in their petition not only that the reservation was effective to deprive the Federal Power Commission of authority under the Federal Power Act to issue a license for development of electric power from the waters of the Niagara River, but also that they have sustained or are immediately in danger of sustaining some direct injury as the result of the determination to the contrary made by the Court of Appeals for the District of Columbia Circuit.

We are not here concerned with petitioners' failure to show that the reservation was legally effective. It suffices, assuming that there is such a showing, to point out that petitioners have totally failed to show that they have sustained or are immediately in danger of sustaining some direct injury as the result of the decision below. The only statement in the petition which purports to assert injury to petitioners is:

> "Unless reversed or vacated, the judgment below is *res judicata* that a Senate reservation was ineffective to accomplish its purpose. It is not right that these petitioners be left in the position of having their claims to the protection of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events. The public importance of the question decided adversely below adds emphasis to the problem." (Petition, p. 20)

The enactment of Public Law 85-159 having settled every possible controversy in this case, there is no possibility of the doctrine of *res judicata* being invoked in the future.

Furthermore, the contentions of petitioners are devoid of merit. The Senate reservation did not afford petitioners the claimed protection. If the Senate reservation legally had the effect claimed by petitioners, then it only afforded them the right they have in common with people generally to petition Congress. No one questioned in the Court below petitioners' or anyone's right to petition Congress, nor the power of Congress to enact special legislation with respect to the construction of certain works of improvement in the Niagara River for power. As has been shown, petitioners have exercised their right in this respect and Congress has exercised its power, both irrespective of the

effectiveness of the reservation or the correctness of the adjudication below. Instead of precluding petitioners from getting an adjudication of their claims to the protection of the Senate reservation, Public Law 85-159 precludes petitioners from now asserting any need for such protection. They have what they wanted, at least as much as they can ever get, unless Congress changes the law. We admit the public importance of the question decided below, but we deny that this gives petitioners such an interest in the subject matter as to enable them to petition for certiorari. The petition should therefore also be denied on the ground that petitioners have no justiciable interest.

There Is No Occasion For This Court To Exercise Here Its Supervisory Power Over Judgments Of Lower Federal Courts.

We are aware that

> "* * * The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. * * *" *U. S.* v. *Munsingwear*, 340 U. S. 36, 39.

But as the footnote to this quotation points out, there have been exceptions to this practice. See *Cantos* v. *Styer*, 329 U. S. 686; *Uyeki* v. *Styer*, 329 U. S. 689; *Pan American Airways Corp.* v. *Grace & Co.*, 332 U. S. 827; *Schenley Distilling Corp.* v. *Anderson*, 333 U. S. 878.

The practice of this Court in this respect is founded upon its supervisory power over the judgments of lower Federal courts and it follows this practice so as to prevent a judgment unreviewed because of mootness from being held *res judicata* in other litigation. There is here no need for the Court to follow this practice because the judgment below

can never be held *res judicata* in any other litigation. There can be no other litigation with respect to the issue presented. Public Law 85-159 not only terminated the controversy presented below, but terminated the possibility of any other similar controversy. It therefore can make no difference to petitioners whether this Court grants the writ of certiorari and vacates the judgment or denies the writ. Petitioners can derive neither benefit nor advantage from a vacatur of the judgment.

Petitioners are in the same position they would have been in had Public Law 85-159 been enacted before the decision of the Court of Appeals was rendered. In that event, the Court of Appeals would have reversed the order of the Federal Power Commission and remanded the matter to the Federal Power Commission for further proceedings. And, that is exactly what it has done here.

The situation is similar to that in *Dinsmore* v. *Southern Express Company*, 183 U. S. 115. There the Court said, in part:

> "If the cause had not been submitted in the Circuit Court of Appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared and that the order of the Railroad Commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the Railroad Commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.
>
> "*As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that*

> *is appropriate* in view of the act of 1901, *we need not consider the grounds upon which that court proceeded,* or any of the questions determined by it or by the Circuit Court, * * *" [Emphasis supplied.]

Similarly, there is no need for the Court to exercise here its supervisory power over the judgments of lower Federal courts.

Justice Requires That The Petition For Certiorari Be Denied.

On the other hand, it may make a difference to respondent and to the People of the State of New York if this Court grants certiorari and vacates the judgment below. This would leave standing the order of the Federal Power Commission dismissing the respondent's license application and it could be urged that respondent has to apply anew for a license. Because of the above mentioned provisions of Section 4, subdivisions (e) and (f) of the Federal Power Act with respect to giving and publishing notice of application, if respondent is required to file a new application it will entail considerable delay and expense.

Attention is called to the fact that the Committees on Public Works of the Senate and the House of Representatives, in reporting favorably upon the bills which became Public Law 85-159, stressed the fact that there exists an emergency need for construction of works of improvement in the Niagara River for power (85th Congress, First Session; Senate Rep. No. 539; House of Representatives Rep. No. 862).

If this Court vacates the judgment below and subsequently it is argued that therefore respondent's original license application stands dismissed by the original order of the Commission and the amended license application is

a nullity because there was nothing to amend, the argument may be a specious one but the fact that such an argument could be made may well have undesirable consequences to respondent and to the People of the State of New York. Certainly this Court should not take any action which could even be said to cast doubt on the validity of the license issued by the Federal Power Commission, on the specific direction of Congress, to respondent on September 19, 1957 and accepted by respondent on October 15, 1957, particularly where as here the validity of that license and of the Act directing its issuance stand unquestioned.

The People of the State of New York are vitally interested in having the Power Authority proceed as quickly as possible to construct and put in operation the project works authorized under the license of September 19, 1957. If this Court vacates the judgment below, various implications will be drawn from its action, not only in respect to its attitude as to the merits of the controversy below but also as to the effect of its action. The latter implications could be used to impede construction of the urgently needed project works. Justice requires, therefore, that the petition be denied.

The Authority Of The Federal Power Commission To Issue To Respondents A License On September 19, 1957, Upon Respondents' Application Of August 20, 1956, As Amended On September 19, 1956 And September 9, 1957 Is Unquestioned.

If this Court should feel impelled to follow the practice delineated in the *Munsingwear* case, *supra*, and grant certiorari and vacate the judgment below, then we request that it consider the issue whether the Federal Power Commission had the authority to issue to respondents the license

of September 19, 1957, upon respondents' application of August 20, 1956, as amended September 19, 1956, and September 9, 1957. We ask this in order to prevent any implication that all the proceedings heretofore had before the Federal Power Commission are a nullity.

The application of the Power Authority, as amended, and the license issued by the Federal Power Commission and accepted by the Power Authority are in accordance with the provisions of the Federal Power Act and Public Law 85-159. Public Law 85-159 specifically makes the provisions of the Federal Power Act applicable to the construction of works of improvement in the Niagara River for power. Therefore, in issuing the license of September 19, 1957, the Federal Power Commission was authorized to consider respondents' original application under Section 4(e) of the Federal Power Act and, since that application was amended on September 9, 1957 to conform with the provisions of Public Law 85-159, the Federal Power Commission unquestionably had authority to issue the license of September 19, 1957. Therefore, if this Court should decide to grant certiorari and vacate the judgment below, we suggest to the Court that it would not be inappropriate for the Court to explain that its action was not intended to cast any doubt on the authority of the Commission to issue the license of September 19, 1957.

The Validity Of The License Of September 19, 1957 Is Unquestioned.

We appreciate that the issue of the validity of the license of September 19, 1957, is not directly before the Court but we suggest that since it is appropriate to go outside the record to bring to the attention of the Court the question whether the case has become moot, it may also be appro-

priate to go outside the record to bring to the attention of the Court the possible consequences of a vacature by the Court of a judgment below on the ground of mootness.

We, therefore, ask the Court to note, if it should decide to vacate the judgment below, that the validity of the license issued on September 19, 1957, is unquestioned.

CONCLUSION.

The Petition For Certiorari Should Be Denied.

October 14, 1957.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions, Treaties, Federal Statutes, Rules Of The Supreme Court, Orders Of The Federal Power Commission And State Statutes And Official Acts Involved.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * *
>
> "2. * * * In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

1950 Treaty between the United States and Canada, Niagara River, Water Diversion, and Senate Reservation thereto, are set forth in the Joint Appendix below, pages 25-32. The reservation states:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

28 U. S. C. § 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

Federal Power Act § 313(b):

"Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States * * *. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification * * *."

Rule 19 of the Revised Rules of the Supreme Court of the United States:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor."

Federal Power Act § 4:

"The Commission is hereby authorized and empowered:

"(e) To issue licenses * * * to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, * * * *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

"(f) * * * the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated."

Act of August 21, 1957, 71 Stat. 401, P. L. 85-159—This Act is set forth in Appendix D to the petition. It provides in part:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

"(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

"(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for

profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

"(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. * * *."

Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license, is set forth in Appendix B to the petition.

Order of the Federal Power Commission of September 19, 1957, issuing a license to respondent, is set forth in Appendix 4 to respondent's brief but in pertinent part provides:

"(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), for a period of 50 years, effective as of September 1, 1957, for the construction, operation and maintenance of the Niagara Project No. 2216, located on the Niagara River, a navigable water of the United States and an international boundary stream, in the vicinity of Niagara Falls, for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada, subject to the terms and conditions of the Federal Power Act, and the aforementioned Public Law 85-159, both of which are incorporated by reference as part of this license, and sub-

ject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, and subject to the applicable provisions of the aforementioned 1950 treaty between the United States and Canada."

The license also sets forth verbatim the above quoted provision of Public Law 85-159.

New York Public Authorities Law § 1001:

"Those parts of the Niagara and Saint Lawrence rivers within the boundaries of the state of New York are hereby declared to be natural resources of the state for the use and development of commerce and navigation in the interest of the people of this state and the United States. In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, and to preserve and enhance the scenic beauty of the Niagara Falls and river, such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the watersheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their ownership, possession and control, shall always remain inalienable to, and ownership, possession and control thereof shall always be vested in, the people of the state. As amended L. 1951, c. 146, § 1, eff. March 20, 1951."

New York Public Authorities Law § 1005, subd. 3:

"* * * provided, however, that nothing herein contained shall be construed as limiting the power of the authority [respondent] to accept a license issued by the federal power commission pursuant to the provisions of the federal power act, as amended, and the terms and conditions therein imposed pursuant to law * * *."

New York Public Authorities Law § 1008:

"The state of New York hereby consents to the occupation and use by the authority of any and all property of the state of whatever kind or character on the Niagara river or within the international rapids section of the Saint Lawrence river, and hereby vests the authority with and delegates to it the right to exercise any and every right and power of the state in connection therewith, whether proprietary or sovereign in character, which the state itself might exercise, provided that such consent and delegation of power shall not permit the impairment or limit or prevent the future improvement of the navigability of the Niagara river or the international rapids section of the Saint Lawrence river, consistent with the maintenance of such projects, but on the contrary the projects shall be such as will improve and benefit commerce and navigation therein and provided further that the authority shall have no power to limit, waive or surrender any right or interest of the state of New York in such rivers or the use thereof. As amended L. 1951, c. 146, § 14, eff. March 20, 1951."

APPENDIX B.

(SEAL)

STATE OF NEW YORK
DEPARTMENT OF LAW
Albany

Louis J Lefkowitz
Attorney-General

July 5, 1957

Hon. Robert Moses
Chairman, Power Authority of the
State of New York
The Coliseum Tower
10 Columbus Circle
New York 19, New York

Dear Chairman Moses:

You have inquired whether the Power Authority of the State of New York could, under the provisions of Sections 1001, *et seq.*, of the New York Public Authorities Law, accept a license granted by the Federal Power Commission for the construction and operation of a power project with capacity to use all of the United States' share of the waters of the Niagara River, if issued pursuant to provisions and conditions such as contained in S. 2406.

I am of the opinion that should S. 2406 become law and should the Federal Power Commission issue, pursuant to provisions and conditions contained therein, a license to the Authority, the Authority could, under the provisions of Sections 1001, *et seq.*, of the New York Public Authorities Law, accept such a license.

S. 2406 authorizes and directs the Federal Power Commission to issue a license to the Authority for the construc-

tion and operation of such a power project and to include, in addition to those required by the Federal Power Act, the following numbered licensing conditions:

1. The condition that the Authority, in disposing of 50 per centum of the project power, "shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance" and, if such project preference power is sold to utility companies organized for profit, to make provision for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

This condition is not inconsistent with the preference policy stated in the New York Law, to wit: that in the development of hydroelectric power from the waters of the Niagara River the power "shall be considered primarily as for the benefit of the people of the state as a whole and particularly the domestic and rural consumers to whom the power can economically be made available" and that in furtherance of this policy and to insure use of the power "of the greatest value to the general public" the Authority shall make provision "so that municipalities and other political subdivisions * * * may secure a reasonable share of the power generated".

The Authority has applied this preference policy in the allocations it has made of the power to be generated by its St. Lawrence power project and these allocations have been approved by the Governor acting upon an opinion of the Attorney General that the allocations properly carried out the preference policy stated in the New York law. The allocations made by the Authority of the power to be generated by its St. Lawrence project were 360,000 kw to industrial consumers and 370,000 kw to rural and domestic consumers, including those served by municipalities, rura

electric cooperatives, private utilities and other states. With respect to the latter allocation, the Authority, with the approval of the Governor, entered into contracts for the sale of 100,000 kw to the State of Vermont for resale mainly to rural and domestic consumers; 10,000 kw to the United States Airforce Base at Plattsburgh for defense purposes; 30,000 kw to the City of Plattsburgh for resale to domestic and rural consumers through its municipal sysem; 115,000 kw to Niagara-Mohawk Power Corporation for resale to domestic and rural consumers, to whom there would be passed on the financial savings derived from the purchase of the power by Niagara-Mohawk.

The Authority has also made a tentative allocation of power to be generated by the proposed Niagara project, which allocation also carries out the preference policy stated in the New York law. That tentative allocation is as follows:

Niagara Mohawk (Replacement of Losses at Schoellkopf Plant)	445,000 kw
Anticipated Demands for New National Emergency Defense Plants	300,000 "
Expansion of Existing Industries on Niagara Frontier	250,000 "
Ohio & Pennsylvania Assuming Official Agencies not now in existence are created by law to make firm reliable contracts	150,000 "
Niagara Mohawk, NYSE&G & Rochester Gas & Elec. for Rural & Domestic Consumers	730,000* "
Municipalities including Jamestown and Rural Elec. Coops. within Economic Transmission Distance in New York State which can use and pay for Power	125,000 "
	2,000,000 kw

* 200,000 kw withdrawable for Municipalities and Rural Electric Cooperatives.

These allocations would carry out, as did the St. Lawrence allocations, the policy stated in the New York law, in that the allocations would benefit the people as a whole and particularly domestic and rural consumers. The allocation of 300,000 kw to defense plants would certainly benefit the people as a whole.

2. The condition that the Authority shall make a reasonable portion of the project power subject to the preference provisions available for use within reasonable economic transmission distance in neighboring States (not more than 20 per cent of the project power subject to such preference); provided, if any neighboring State shall have designated a bargaining agency for the procurement of such power, the Authority shall deal only with such agency.

This condition is also consonant with New York law which provides that in disposing of project power the Authority may make appropriate provision "to allocate a reasonable share of project power to agencies created or designated by other states".

The Authority carried out this policy stated in the New York law in the allocation made with respect to St. Lawrence Project power and, with the approval of the Governor, the Authority has entered into a contract for the sale to the State of Vermont of 100,000 kilowatts of the power generated by that project for resale to rural and domestic consumers.

The tentative allocation of 150,000 kilowatts of the power to be generated by the proposed Niagara Project to Ohio and Pennsylvania assuming official agencies, not now in existence, are created by law to make firm reliable con-

tracts, would also carry out the policy stated in the New York law.

Furthermore, this tentative application accords with the provision contained in S. 2406 for making a reasonable portion of the project power subject to the preference provisions available for use within reasonable economical transmission distance in neighboring states. It is significant that this provision in S. 2406 does not require a minimum allocation of project preference power to neighboring states, but provides that the condition shall not be construed to require an allocation of more than 20 per centum of the project power subject to such preference provisions. However, if 20 per centum should be considered the minimum as well as the maximum, there would have to be only a relatively small increase in the tentative allocation to neighboring states to meet such minimum. S. 2406 leaves, as did the Authority's St. Lawrence Project license, the question of the minimum reasonable portion to be made available for use in neighboring states to the determination of the Federal Power Commission in the event of disagreement between the Authority and the power marketing agencies of such states.

The power vested in the Federal Power Commission by the provision contained in the Authority's St. Lawrence Project license and in S. 2406 to determine and fix the applicable portion of power to be made available in neighboring states does not offend the New York law.

The proviso in S. 2406 that the Authority shall deal with bargaining agencies for the procurement of power designated by neighboring states is, as noted above, in accordance with the New York law.

3. The condition that the Authority shall contract, with the approval of the Governor and in accordance with the

procedure established by New York law, to sell to the licensee of Federal Power Commission Project 16 445,000 kilowatts of remaining project power for resale generally to industries so as to restore to such industries low cost power, provided the licensee of Project 16 consents to the surrender of its license, releases any claim for compensation from the Authority or from the State, except tangible property and rights of way taken, and waives all claims for compensation based upon loss of riparian diversionary or other rights relating to the use of the water.

This condition also accords with the policy stated in the New York law. Subdivision 5 of Section 1005 of the New York Public Authorities Law empowers the trustees of the Authority, with the approval of the Governor, to allocate a sufficient portion of Niagara Project power for use by high load industries at or near the project site and, to accomplish the purposes of the Power Authority Act, i. e., to benefit the People of the State as a whole, particularly the domestic and rural consumers to whom the power can economically be made available, to sell power for use by industry to secure a sufficient high load factor and revenue returns to permit domestic and rural use at the lowest possible rates. Indeed, without the power to allocate a sufficient portion of project power to high load industries, the purposes of the New York law could not be achieved.

The Authority applied the policy of the New York law when it, with the approval of the Governor, entered into contracts for the sale of 174,000 kilowatts to Aluminum Company of America and 200,000 kilowatts to Reynolds Metal Company of St. Lawrence Project Power.

The tentative allocation of power from the proposed Niagara Project of 445,000 kilowatts to Niagara Mohawk

for replacement of losses at Schoellkopf Plant and of 250,000 kilowatts for expansion of existing industries on Niagara Frontier would likewise be in accordance with the provisions of the New York law.

Under New York law the Authority has the power to acquire from the licensee of Project 16 tangible property and rights of way and to pay just compensation therefor and the release and waiver by the licensee of Project 16 of other claims or rights would not contravene the New York law.

4. The condition that the Authority shall, if available at reasonable terms, acquire by purchase or other agreement the ownership or use of or, if unable to do so, construct such transmission lines as may be necessary to make the power available to privately owned companies, to preference customers and to neighboring states.

This condition accords with the New York law (Pub. Auth. Law, § 1005, subd. 7) which authorizes the Authority to proceed with the erection of "such transmission lines as may be necessary to conduct electricity to industrial users located at or near the site; and including also the acquisition, by contract only with the owners thereof, of transmission lines or the use of such transmission lines, available or which may be made available, to conduct electricity to such point or points at which electricity is sold by the Authority to any person, corporation or association, public or private."

The provisions in both S. 2406 and New York Public Authorities Law, § 1005, subdivision 7, would deny to the Authority the power to appropriate or condemn existing transmission lines and would require the Authority to construct transmission lines only if it were unable to acquire

the ownership or use of existing transmission lines by purchase or other agreement upon reasonable terms and conditions.

Because there were no existing transmission lines to carry St. Lawrence Project Power to Plattsburgh, the United States Air Force Base at Plattsburgh and to Vermont, the Authority is now engaged in erecting such a transmission line.

5. The condition that in the event that project power is sold to any purchaser for resale, the Authority shall make contracts which shall include provisions for establishing resale rates.

This condition accords with the mandate of the New York law (Pub. Auth. Law, § 1005, subdivision 6(g), and § 1014).

With the approval of the Governor, the Authority has entered into a contract with the Niagara Mohawk Power Corporation for the sale of St. Lawrence Project power to it for resale to domestic and rural consumers under the terms of which Niagara Mohawk is required to pass on to such consumers such financial savings as it may derive from the purchase of the power.

6. The condition that the Authority in cooperation with the appropriate agency of the State concerned with the development of parks may construct a scenic drive and park on the American side of the Niagara River, the cost of which shall be considered a part of the cost of the power project provided it shall not exceed $15,000,000.

This condition does not contravene the New York law because the Authority is empowered by subdivision 3 of Section 1005 of the New York Public Authorities Law to accept a license issued by the Federal Power Commission

pursuant to the provisions of the Federal Power Act, as amended, and to accept the terms and conditions therein imposed pursuant to law, particularly where, as here, the condition does not conflict with the New York law. Indeed this condition would be a fulfillment of the policy of the New York law "to preserve and enhance the scenic beauty of the Niagara Falls and river".

7. The condition that the Authority shall pay to the United States and include in its net investment in the project the United States' share of the cost of the construction of certain remedial works provided in Article II of the Treaty between the United States and Canada.

For the reason stated as to condition No. 6 and also for the reason that, under subdivision 7 of Section 1005 of the New York Public Authorities Law, the Authority is authorized to undertake such remedial works, this provision does not contravene the New York law.

As shown above, the New York law does not prevent the Authority from accepting a license issued by the Federal Power Commission for the construction and operation of a power project with capacity to use all of the United States' share of the waters of the Niagara River, if such license were issued pursuant to the provisions and conditions as contained in S. 2406.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

JRDAVISON:jml